Supreme Court, U.S.
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No. 98-1844

In The

# Supreme Court of the United States

PETER SUDARSKY,

*Petitioner,*

v.

CITY OF NEW YORK, NEW YORK CITY PLANNING DEPARTMENT, NEW YORK CITY TRANSIT AUTHORITY, and THE METROPOLITAN TRANSIT AUTHORITY,

*Respondents.*

**On Petition For A Writ Of Certiorari To The New York State Court Of Appeals**

## SUPPLEMENTAL BRIEF

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## BASIS FOR RULE 15.8
## SUPPLEMENT TO PLAINTIFF'S PETITION

This rule 15.8 supplemental brief is based on This Court's decision in *The City of Monterey v. Del Monte Dunes Corp.* (119 S.Ct. 1624), which bears directly on my petition for certiorari in *Sudarsky v. City of New York.*

In both cases the municipality came up with a series of constantly changing requirements which put plaintiffs' development proposals on permanent hold. After years of dangling a carrot in front of the nose of the respective plaintiffs, it became apparent that each defendant had effected a taking of all use the owners could make of their property.

Although the facts of both cases are similar and the causes of action identical, the decisions of the federal and state courts are diametrically opposed. Either the Ninth Circuit of the Court of Appeals or the Appellate Division First Department of New York erred. This Court has now upheld the federal court's award of damages in a regulatory takings case where just compensation has been denied.

In contrast, the New York court in *Sudarsky v. City of New York* rejected my damage claim and granted summary judgment to The City after an assumption that my case lacks merit. The court reached its assumption without consideration of factual issues essential to its finding by either a jury or court. Based in part upon its erroneous and unexplained assumption, The New York court then found a requirement for notice of claim and rejected my motion for consent to file late notice or deem notice requirements met.

My petition for *certiorari* asks This Court to resolve the inconsistency between the federal and state court systems. This Court's clear answers in its *City of Monterey* decision are meaningless in New York if the New York courts can circumvent standards of constitutional protection for property owners.

> My petition for *certiorari* raises, therefor, the question of whether a municipality (as opposed to a state or federal agency) may avail itself of a strictly procedural notice-of-claim barrier to bar what would otherwise be a meritorious case where a taking of property is alleged to have occurred absent just compensation in violation of The Fifth Amendment.

For all the reasons in *The City of Monterey* and its concurring and dissenting opinions, my regulatory takings claim warrants trial.

## REVIEW OF ESSENTIAL FACTS AND PROCEDURAL HISTORY

I have alleged that all use of my property was taken by defendant City of New York by a series of actions and inactions which resulted in the forced sale of the property at a price of $10,000,000 less than its fair value after The City withdrew its conditioning of an as-of-right permit upon my granting an uncompensated easement.

Feb. 3, 1998, the Appellate Division, First Department, upheld a decision of the court below granting summary judgment to the City on grounds that plaintiff failed to recommence the case in state court within applicable time limits following its dismissal on ripeness

grounds in federal court. Although The Appellate Division did not "agree with" the finding of the court below on the timeliness issue, the appellate panel went on to find that a notice of claim was required where plaintiff failed to give an adequate reason for delay in seeking leave to file late notice *and* in circumstances where plaintiff's case lacks "substantive merit." (Appendix A)

The Appellate Division gave no reasons for its assumption on the merits. The panel made reference to "reasons in" the dicta of a 1991 decision in Federal District Court, Southern District, by Robert J. Ward, Jr., but the panel failed to find in the record that Judge Ward, himself, held he had made "clear" that he did not "reach the merits" of my regulatory takings claim.

## ARGUMENT

This Court's decision in City of Monterey establishes that a finding on the merits of a regulatory takings case where a claim exists that all use of property has been taken warrants determination of whether all use of property was, in fact, taken and whether actions taken by defendants which impact upon use of property "substantially advanced a legitimate public interest."

The New York Appellate Division's grant of summary judgment to The City precluded trial of these issues by either a jury or court of competent jurisdiction. Instead, the New York Court imposed a notice requirement in part upon the basis of its unsubstantiated assumption on the merits.

The New York Court might just as well have said "This case has no merit because we intend to protect the financial interests of The City, and that is reason enough."[1]

## DICTA IN THE 1991 DECISION OF THE FEDERAL DISTRICT COURT DID NOT PROVIDE A BASIS FOR A FINDING OF LACK OF MERIT.

The New York court may have relied upon dicta in a 1991 federal district court opinion that was issued before This Court's decision in *Dolan v. City of Tigard*. This

[1] Defendants alleged that their permit ban was intended to facilitate obtaining an easement from plaintiff to provide an alternate route for a future pedestrian tunnel to connect two subway lines. Plaintiff alleges that because subway access for the tunnel was permanently waived into both subway stations a tunnel was intended to connect, that the easement was a sham. The tunnel could not be built, not now, not ever. A tunnel which cannot be built cannot facilitate any solution to a problem which might have been created by my plans for a new apartment house a block away.

The conditioning of issuance of a permit on my grant of an easement raises an issue of fact as to whether defendants' permit ban met requirements for nexus set forth in This Court's *Dolan* ruling or served any legitimate public purpose. The ban continued for a year after defendants downzoned the property. Political convenience rather than planning needs may have motivated the actions of The City. The certification of the easement requirement may have been intended to provide a smoke screen to evade Supreme Court jurisprudence and preserve the power to take property without paying for it.

The New York Court did not acknowledge that an issue of proportionality was raised in my complaint.

Court's findings in *Dolan* made obsolete the federal district court's finding of adequate nexus in this case.

**"LACKS SUBSTANTIVE MERIT" IS BECOMING A TERM OF ART WHICH IS INAPPLICABLE TO THIS REGULATORY TAKINGS CLAIM.**

It suggests that the court wants to avoid the work of reaching the record and still escape judicial review. Reasons for the panel's assumption on the merits remain concealed in this case involving what in layman's terms can be called municipal theft of property.

The panel may have assumed that in a period of market weakness plaintiff lacked the resources to build the project.[2]

More likely, The Court acted in the belief that it was protecting the right of municipal regulators to regulate. If so, the New York panel was operating without respect for limitations to that right imposed by This Court's jurisprudence.

Whatever reasons the panel may have had for its assumption on the merits, it did not share them with plaintiff or with The Appellate Division. This Court is left with the problem of deciding whether the panel's casual

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[2] Because the panel made no reference to the record which was before The Court in my first appeal in which the first panel rejected a *res judicata* finding of the trial court, the second panel may not have realized that many of the apartments in the planned project had been pre-sold to the Japanese bank financing the project. The Sumitomo Bank required apartments for its own executives within walking distance of its executive offices on Park Ave. in the area where living units for its executives had not been available.

assumption of lack of merit takes precedence over standards of constitutional protection for property owners set forth by This Court in a line of decisions extending over more than 120 years commencing with *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L.Ed. 557 (1871) and concluding with *City of Monterey v. Del Monte Dunes Corp.* (infra).

Defendants' waiver of a response leaves undisputed the facts in my petition. This Court's findings in *The City of Monterey* provide authority for petitioner's argument that the court below was wrong when it came up with its assumption on the merits and its grant of summary judgment.

I ask The Court to accept this petition for *certiorari* or alternatively to reverse and remand for trial. This Court's decision in *The City of Monterey v. Del Monte Dunes* answers questions of law my case may present.

Trial of the issues is warranted.

Submitted by plaintiff,

PETER SUDARSKY